2 No. 06-846

FILED
JAN 18 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

IN RE M2 SOFTWARE, INC.,

Petitioner.

On Petition For A Writ Of Mandamus To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

LARRY W. MCFARLAND, ESQ.
Counsel of Record
DAVID K. CAPLAN, ESQ.
KONRAD K. GATIEN, ESQ.
KEATS MCFARLAND & WILSON LLP
9720 Wilshire Blvd., Penthouse Suite
Beverly Hills, California 90212
Tel. (310) 248-3830

Attorney for Respondent
M2 Communications, L.L.C.

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

1. Whether Judge Pregerson held a "direct financial interest" in the subject matter in controversy sufficient to require his mandatory recusal under 28 U.S.C. § 455, and, if so, whether such recusal should require the Ninth Circuit to recall the mandate and reassign the underlying appeal.

LIST OF PARTIES AND RULE 29.6 LISTING

Respondent/Real Party in Interest M2 Communications, L.L.C.'s ("Respondent") name was changed to INO Records, L.L.C. It is a wholly owned subsidiary of Integrity Media, Inc.

As the question presented does not involve the Ninth Circuit's decision to dismiss defendant Jeff Moseley for lack of jurisdiction, *see M2 Software, Inc. v. M2 Communications, L.L.C.*, 149 Fed.Appx. 612, 615 (9th Cir. September 12, 2005), *reh'g en banc denied* (9th Cir. Nov. 1, 2005), he is not properly listed as a real party in interest. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 579 n.3 (1986).

TABLE OF CONTENTS

		Page
I.	STATEMENT OF THE CASE	1
II.	REASONS FOR DENYING THE WRIT	4
	A. Introduction	4
	B. There Are No Extraordinary Circumstances Warranting the Recall of the Mandate in This Case	6
	C. Disqualification of Judge Pregerson Is Not Warranted Under 28 U.S.C. § 455(a)	7
	D. Disqualification of Judge Pregerson Is Not Warranted Under 28 U.S.C. § 455(b)(4)	9
	E. Disqualification of Judge Pregerson Is Not Warranted Under 28 U.S.C. § 455(b)(5)(i)	10
	F. Due Process Is Not At Issue	11
III.	CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

Boston & Maine Corp. v. Town of Hampton, 7 F.3d 281 (1st Cir. 1993) 6

Calderon v. Thompson, 523 U.S. 538 (1998) 6

Chase Manhattan Bank v. Affiliated FM Ins. Co., 343 F.3d 120 (2d Cir. 2003) 10

Hanshaw Enterprises, Inc. v. Emerald River Develop., Inc., 244 F.3d 1128 (9th Cir. 2001) 7

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1945) 6

In re Aguinda, 241 F.3d 194 (2d Cir. 2001) 8

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 5, 7, 9, 10

M2 Software, Inc. v. M2 Communications, L.L.C., 149 Fed.Appx. 612 (9th Cir. Sept. 12, 2005) ii

M2 Software, Inc. v. M2 Communications, L.L.C., 463 F.3d 868 (9th Cir. 2006) 1, 2, 3, 4

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) ii

New York City Develop. Corp. v. Hart, 796 F.2d 976 (7th Cir. 1986) 7

O'Regan v. Arbitration Forms, Inc., 246 F.3d 975 (7th Cir. 2001) 8

Standard Oil Co. of Cal. v. United States, 429 U.S. 17 (1976) 6

United States v. Bayless, 201 F.3d 116 (2d Cir. 2000) 5

TABLE OF AUTHORITIES – Continued

Page

United States v. Lauersen, 348 F.3d 329 (2d Cir. 2003) 7, 8

United States v. Rogers, 119 F.3d 1377 (9th Cir. 1997) 8

STATUTES

28 U.S.C. § 455 ..... *passim*

Cal. Civ. Code § 3439.01 2

OTHER AUTHORITIES

Black's Law Dictionary (8th ed. 2004) 11

16 C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3938 (2d. ed. 1996) 6

Jones, Rosen, Wegner & Jones, RUTTER GROUP PRACTICE GUIDE: FEDERAL CIVIL TRIALS & EVIDENCE (The Rutter Group 2006) 11

BRIEF IN OPPOSITION FOR REAL PARTY IN INTEREST M2 COMMUNICATIONS, L.L.C.

I. STATEMENT OF THE CASE

This is a trademark infringement action brought by Plaintiff/Petitioner M2 Software, Inc.

M2 Software's Petition follows the Ninth Circuit's denial of its motion to recall the mandate, vacate the opinion, and reassign the underlying appeal in *M2 Software, Inc. v. M2 Communications, L.L.C.*, 463 F.3d 868 (9th Cir. 2006) (*see* Petitioner's Appx. "A") (hereinafter "*M2 Communications*") and denial of Petitioner's request for a rehearing *en banc* of the issue (*see* Petitioner's Appx. "C").

M2 Software's motion is based on the fact that a Ninth Circuit panelist, Judge Pregerson, owned stock in Time Warner during the reporting period covered by January 1, 2003 through December 31, 2004. (Pettinari Decl., Exh. 2 at 8, 11).[1]

M2 Communications, L.L.C. is a distributor of Christian music recordings, some of which were distributed under its "M2.0" label. (SER 0159-61, 0385-86.)[2] M2 Software alleged that M2 Communications infringed M2 Software's "M2" trademark. M2 Software also alleged that

---

[1] At the July 20, 2006, market valuation of Time Warner, the amount of stock owned by Judge Pregerson would have been less than 0.000022 percent of the company. (Dec. of David K. Caplan In Supp. of Opp. to Mot. to Recall Mandate, Exh. 3.)

[2] Citations to "ER" are to Petitioner's Excerpts of Record before the Ninth Circuit; Citations to "SER" are to Real Party in Interest M2 Communications' Supplemental Excerpts of Record Before the Ninth Circuit.

Word Entertainment infringed M2 Software's trademark through distribution of M2 Communications' products pursuant to a distribution agreement. (ER 65-2/16). Based on this allegation regarding Word Entertainment, M2 Software sued Gaylord Entertainment Company, the parent company of Gaylord Creative Group, Inc., which in turn owned Word Music Group, Inc. Until its sale in January 2002, Word Entertainment was a wholly owned subsidiary of Word Music Group, Inc. Thus, until January 2002, the defendant Gaylord was the great-grandparent company of the alleged infringer Word Entertainment.

In or about November 2001, three months prior to the filing of the complaint in *M2 Communications*, defendant Gaylord announced the sale of Word Entertainment to Warner Music Group. (ER 58-31). That sale closed in January 2002, one month prior to the filing of the action. (ER 58-31; ER 90-2). Gaylord informed M2 Software of this sale in March 2002. (ER 58-44). At the time that M2 Software served Gaylord with the complaint in *M2 Communications*, in June 2002, it was aware that Word Entertainment was owned by Warner Music Group, which at that time, was owned by Time Warner, Inc. Indeed, based on this sale to Warner Music Group, M2 Software claimed that Gaylord committed a fraudulent transfer under Cal. Civ. Code § 3439.01. (ER 4-17.) Notably, M2 Software never sued Warner Music Group or Time Warner. Indeed M2 Software never even sued Word Entertainment, nor its parent, Word Music Group, Inc., nor its parent Gaylord Creative Group, Inc.

On August 1, 2003, the District Court issued its Summary Judgment Order in which it granted summary judgment to M2 Communications. On September 19, 2003,

M2 Software filed its amended notice of appeal of the summary judgment and jurisdiction decisions.

On November 24, 2003, Time Warner announced that it had sold Warner Music Group (the parent of Word Entertainment).[3] (Dec. of David K. Caplan In Supp. of Opp. to Mot. to Recall Mandate, Exh. 1.)

On December 24, 2003, M2 Software filed its Opening Brief. On March 3, 2004, M2 Communications filed its Answering Brief. On April 1, 2004, M2 Software filed its Reply Brief.

On November 10, 2004, a calendar check was performed in the Ninth Circuit to assign the case for oral argument. On November 30, 2004, over nine months after the sale of Warner Music Group by Time Warner, the case was calendared for argument. On February 7, 2005, the case was argued and submitted to Judge Harry Pregerson, Judge William C. Canby, and Judge Robert R. Beezer of the Ninth Circuit. On September 12, 2005, the Ninth Circuit issued its Memorandum affirming the District Court's decisions. On September 26, 2005, M2 Software filed its petition for rehearing and rehearing *en banc* which was denied by the Ninth Circuit on November 1, 2005. On November 8, 2005, the mandate issued. On January 30, 2006, M2 Software filed a petition for a writ of certiorari in *M2 Communications*. The Supreme Court denied this petition on April 17, 2006. On May 12, 2006, M2 Software filed its petition for rehearing in *M2 Communications*, which was denied by the Supreme Court on June 12, 2006.

---

[3] On February 27, 2004, this deal was completed. (Dec. of Mark L. Pettinari in Supp. of Mot. to Recall).

On July 7, 2006, M2 Software filed its motion to recall the mandate which is at issue in its Petition. On August 21, 2006, in a published decision the Ninth Circuit denied the motion to recall the mandate. 463 F.3d 868. On September 28, 2006, M2 Software filed its petition for rehearing and rehearing *en banc* which was denied by the Ninth Circuit on October 26, 2006. The Ninth Circuit issued its mandate on November 27, 2006, which was followed by the filing of the Petition by M2 Software.

II. REASONS FOR DENYING THE WRIT

A. Introduction.

Petitioner M2 Software, Inc.'s request should be denied for the following reasons: (1) There are no extraordinary reasons to warrant the drastic remedy of recalling the mandate; (2) Petitioner's argument is based on a question of fact, namely, whether Judge Pregerson held a "direct financial interest" in the subject matter in controversy; and (3) There is no conflict between the Circuits on the issue raised by Petitioner and the precedential value of this case, as with any case considering fact-specific issues, is *de minimis*.

The basis for the instant Petition arises out of Judge Pregerson's alleged "direct financial interest" in *M2 Communications*. Judge Pregerson owns stock in Time Warner, which M2 Software identifies as the "active moving force" behind the alleged infringement. In fact, Time Warner has no relationship to this case. From the time Judge Pregerson was assigned to the *M2 Communications* action, Time Warner has been the *former* grandparent company of a *former* great-grandchild company

(Word Entertainment) of a defendant (Gaylord Entertainment). Time Warner has no relevance to this case.

Indeed, whether Judge Pregerson held such interest is a question of fact which has been decided by a panel of three Circuit Court judges and affirmed in the denial of M2 Software's petition for *en banc* review. The issue has been fully and finally decided. As Judge Pregerson confirmed in his concurrence in *M2 Communications*, he held only an equitable, contingent interest "in a company (a) that had an *option* to purchase 19.9% of a company (b) that owned a company (c) that *contracted* with a party to this suit," which interest was unknown to Judge Pregerson at the time the orders Petitioner seeks to vacate were entered. (*See* Petitioner's Appx. "A" at 2a.) As such, Judge Pregerson had no financial interest in the subject matter in controversy sufficient to warrant his recusal under 28 U.S.C. § 455(a) or (b). *See United States v. Bayless*, 201 F.3d 116, 127 (2d Cir. 2000) ("Disqualification is not required on the basis of remote, contingent, indirect or speculative interests.") (citations omitted).

This Court established the requirements for an analysis of conflicts in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 861 (1988). In light of the clear decision in *Liljeberg*, a decision in this case will be of no precedential value beyond this case.

This Court should deny the Petition.

B. There Are No Extraordinary Circumstances Warranting the Recall of the Mandate in This Case.

"In light of the 'profound interests in repose' attaching to the mandate of a court of appeals, the power [to recall the mandate] can be exercised only in extraordinary circumstances. . . . The sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 550 (1998) (*quoting* 16 C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3938, p. 712 (2d. ed. 1996).

Moreover, when a motion to recall a mandate is based on allegations of misconduct affecting the integrity of the judicial process, the harm must be "gross" and enforcement of the judgment "manifestly unconscionable." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245 (1945), *overruled on other grounds*, *Standard Oil Co. of Cal. v. United States*, 429 U.S. 17 (1976).

Recognizing this principle, the First Circuit stated that "If we were in error in this case, of which we are not presently persuaded, we believe it would be far greater error to permit reconsideration now after denial of petitions for rehearing and certiorari. There must be an end to dispute." *Boston & Maine Corp. v. Town of Hampton*, 7 F.3d 281, 283 (1st Cir. 1993).

M2 Software's Petition fails to establish that this case presents any "grave, unforeseen contingencies." *Calderon*, 523 U.S. at 550. Judge Pregerson's ownership of a negligible amount of stock in a company (1) which is not a party, (2) whose strained multi-layer distal relationship to this case ended over nine months prior to Judge Pregerson

being assigned to hear this case, and (3) which despite M2 Software's claim that it is the "active driving force" behind the alleged trademark infringement, was never sued by M2 Software, is not such an extraordinary circumstance.

Thus, this Court should deny the Petition.

C. Disqualification of Judge Pregerson Is Not Warranted Under 28 U.S.C. § 455(a).

Title 28 U.S.C. § 455(a) provides that "any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The Supreme Court has held that § 455(a) applies where the judge lacks knowledge of the facts indicating the judge's interest in the case "if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. at 861; *F.J. Hanshaw Enterprises, Inc. v. Emerald River Develop., Inc.*, 244 F.3d 1128, 1144 (9th Cir. 2001). To warrant disqualification, the movant must show that "an objective, disinterested observer fully informed of the underlying facts [would] entertain significant doubts that justice would be done absent recusal." *United States v. Lauersen*, 348 F.3d 329, 334 (2d Cir. 2003) (citation omitted); *see also New York City Develop. Corp. v. Hart*, 796 F.2d 976, 980 (7th Cir. 1986) ("the inquiry is objective, from the point of view of a reasonable person with access to all of the facts").

> Where a case . . . involves remote, contingent, indirect or speculative interests, disqualification is not required. . . . Moreover, where the standards governing disqualification have not been met,

> disqualification is not option; rather it is prohibited. As we have stated, a judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is.

In re Aguinda, 241 F.3d 194, 201 (2nd Cir. 2001).

While a showing of knowledge is not required under § 455(a), "there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance." *Liljeberg*, 486 U.S. at 862. *See also Lauersen*, 348 F.3d at 334 (no recusal required where a trial judge's wife owned shares which represented .00009 percent of a company entitled to restitution in the case); *O'Regan v. Arbitration Forms, Inc.*, 246 F.3d 975, 988 (7th Cir. 2001) (no recusal required where no reasonable person, in fact no person other than the "hypersensitive, cynical, and suspicious person," would question the tribunal's impartiality); *United States v. Rogers*, 119 F.3d 1377, 1384 (9th Cir. 1997) (no recusal required where judge held a limited financial interest in controversy "as one of millions of stockholders in Bank of America. . . . [thus] no reasonable person with knowledge of all these facts would objectively conclude that the judge's impartiality might reasonably be questioned").

Assuming *arguendo* that Time Warner ever had any relationship to this case, Judge Pregerson owned less than one quarter of the amount of Time Warner than the amount which the court in *Lauersen* found to be a "slight interest, even less significant than the interest termed 'nonexistent'." *Lauersen*, 348 F.3d at 335; *see also Rogers*, 119 F.3d at 1384.

Furthermore, the purported relationship between Time Warner and this case ended at least nine months

before Judge Pregerson was assigned to this case when Time Warner, Inc. sold Warner Music Group.

The plain fact is that Time Warner has nothing to do with this case. Time Warner is the former parent company of a purchaser of a company (Warner Music Group) which was the great-grandchild (Word Entertainment) of a defendant (Gaylord Entertainment Company). Notwithstanding Petitioner's current protestations regarding the importance of Time Warner, Time Warner's lack of involvement is established by M2 Software's own inaction. Despite its knowledge that Warner Music Group purchased Word Entertainment before it served the complaint on Gaylord, M2 Software never sued Warner Music Group. M2 Software likewise never sued Word Entertainment itself or its first parent, Word Music Group, Inc., or its grand-parent company, Gaylord Creative Group, Inc.

Finally, a review of the evidence of Judge Pregerson's conduct also would not merit a reasonable person's suspicion. As this Court has stated, "there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance." *Liljeberg*, 486 U.S. at 862. M2 Software fails to show any unreasonable conduct by Judge Pregerson.

Thus, the Petition should be denied.

D. Disqualification of Judge Pregerson Is Not Warranted Under 28 U.S.C. § 455(b)(4).

M2 Software also asserts that recusal was required under 28 U.S.C. § 455(b)(4). Section 455(b)(4) provides, in relevant part, that a judge shall disqualify himself when: He knows that he . . . has a financial interest in the

subject matter in controversy or in a party to the proceeding.

As distinguished from § 455(a), to warrant recusal under § 455(b)(4), the judge must have actual knowledge of a financial interest. *Liljeberg*, 486 U.S. at 859. Judge Pregerson did not know he owned stock in Time Warner. (Pettinari Decl., Exh. 1 at 3.) M2 Software cites nothing to the contrary. Both *Liljeberg* and *Chase Manhattan Bank* applied § 455(a), not 455(b)(4), and each involved circumstances whereby an objective person would question the judge's impartiality. *Liljeberg*, 486 U.S. at 861; *Chase Manhattan Bank v. Affiliated FM Insurance Co.*, 343 F.3d 120, 130 (2nd Cir. 2003).

There is no evidence that Judge Pregerson (1) knew he owned Time Warner stock, or (2) if he did, knew that Time Warner was involved in this litigation (which it is not). Disqualification under § 455(b)(4) is not warranted.

E. Disqualification of Judge Pregerson Is Not Warranted Under 28 U.S.C. § 455(b)(5)(i).

28 U.S.C. § 455(b)(5)(i) provides, in relevant part, that a judge shall disqualify himself where "he . . . or a person within the third degree of relationship . . . is a party to the proceeding, or an officer, director, or trustee of a party." M2 Software argues that Judge Pregerson violated 28 U.S.C. § 455(b)(5)(i) because Time Warner was somehow a "party" to the proceeding.

The language of the statute makes clear the prohibition is limited to actual parties. Section (b)(4) addresses the issue of financial interest, such as stockholding, and specifically requires knowledge. Section (b)(5)(i) addresses

situations where the judge is a party to the proceeding. If the statute intended to make ownership of stock (or, as here, ownership of stock of a company that has a contingent right to purchase ownership of a company that is a former grandparent of a company which contracted with a party to the proceeding) sufficient to make a judge a "party," section (b)(4) would be extraneous as would section (b)(5)(i)'s specification of officers, directors, or trustees.

The term "party" means "[o]ne who takes part in a transaction." Black's Law Dictionary (8th ed. 2004). *See also* Jones, Rosen, Wegner & Jones, RUTTER GROUP PRACTICE GUIDE: FEDERAL CIVIL TRIALS & EVIDENCE (The Rutter Group 2006) ("The term 'party' means a party to the litigation.") Neither Time Warner, its former subsidiary Warner Music Group, nor Judge Pregerson, have ever been a party to the action. Disqualification under § 455(b)(5)(i) is not warranted.

F. Due Process Is Not At Issue.

M2 Software asserts that it has been deprived of Due Process. However, M2 Software has had its day in court. Each one of its claims have been examined and then reexamined. M2 Software filed a motion for preliminary injunction which was denied, and which denial was upheld by the Ninth Circuit. M2 Software opposed M2 Communications' motion for summary judgment and lost. That loss was reviewed by the Ninth Circuit twice, and the Supreme Court twice, and was upheld each time. M2 Software's claim that Judge Pregerson was biased was examined and rejected by the three judge panel.

Because Plaintiff has not been deprived due process, and because the Ninth Circuit followed the requirements of 28 U.S.C. § 455, this Court should deny the Petition.

III. CONCLUSION

For the foregoing reasons, this Court should deny M2 Software's Petition.

Respectfully submitted,

LARRY W. MCFARLAND, ESQ.
Counsel of Record
DAVID K. CAPLAN, ESQ.
KONRAD K. GATIEN, ESQ.
KEATS MCFARLAND & WILSON LLP
9720 Wilshire Blvd., Penthouse Suite
Beverly Hills, California 90212
Tel. (310) 248-3830

Attorney for Respondent
M2 Communications, L.L.C.